SUPREME COURT, U. S.

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No. 777

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HENRY C. BILLINGSLEY,
Petitioner,

v.

RICHARD L. MACKAY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent cannot concur with the question presented as stated by Petitioner. In Repondent's opinion, the sole question presented for review is "whether the defense of conditional delivery was raised by the pleading, supported by the evidence and found to be true by the trier of facts?"

If the answer is in the negative, and if the successful defense were actually raised for the first time on appeal, then the protests of petitioner take on some substance.

On the other hand, if the defense of conditional delivery was actually pleaded, proved and found at the trial level, then all of Petitioner's elaborate objections are of no avail.

FIRST COUNTERPOINT

Respondent's defense of Conditional Delivery was pleaded, proved, and found to be true by the trial court.

Petitioner does not deny that conditional delivery is a valid defense against one with actual knowledge of the infirmity, but confidentally asserts that the defense was not pleaded. (Petition 2, 5, 6, 7, 8, 9). This is obviously the contention which goes to the heart of his Application. Just as obviously, the issue can only be settled by examining the answer itself. There, under the Third Defense, are found the following allegations:

> a. * * * "on condition that no part thereof should be paid by the defendant until such delivery." (R. 6)
>
> b. * * * "the assignment of the interest by the Defendant was a condition to the validity of such note." (R. 7)
>
> c. * * * "the note would be good only when he received the assignment." (R. 7)

Even if conditional delivery be an affirmative defense, rather than a denial of a portion of Petitioner's prima facie case so that it must be affirmatively pleaded, still the basic

premise of pleading is only to afford fair notice to the parties of the claim and the defense.

Conley v. Gibson, 355 U.S. 41 (1957).

Although an affirmative defense must be pleaded, only fair notice is required, without extensive factual allegations.

American Motorists Insurance Co. v. Napoli, 166 F. 2d 24 (5th Cir. 1948)

2A Moore, Federal Practice, 8.27(3)

Factual detail, if needed, is obtained through discovery rules.

As the Respondent pleaded at three different points and in three different ways that the note was only conditionally delivered, and was not to be valid until he received the assignment of the patent forming the consideration, it is difficult to see just what more could have been done to give Petitioner fair notice

There must, of course, be evidence offered to support the defense pleaded, and it is found in the clear testimony of Respondent. (R. 27). Petitioner appears to concede that this is supporting testimony, but terms it "inadmissible". (Petition, p. 9). The apparent basis for the obpection to the testimony is that it is barred under the parol evidence rule as an attempt to vary the terms of a written instrument. This objection overlooks the well founded rule that parol evidence is admissible when it relates to the very existence of the contract. Conditional delivery is such a defense, and parol evidence is admissible to show that the delivery was upon a condition precedent to its validity.

Cimarron Insurance Company v. Pomeroy, 234 F. 2d 262 (10th Cir. 1956)

Dayvault v. Baruch Oil Corp., 231 F. 2d 413 (10th Cir. 1956)

Ramey v. Koons, 230 F. 2d 802 (5th Cir. 1956)

Equally fatal to Petitioner's Evidence Point is that fact that it has not been preserved for presentation to this Court.

Supreme Court Rules, Rule 23 (1) (c)

Pleading and evidence alone still are not enough to prevail, unless the tier of facts is persuaded of the truth of the asserted defense. The judgment of the trial court (R. 9) expressly holds "* * * Plaintiff received actual notice from Defendant that the validity of the note depended upon Defendant's receiving a one-half interest in the hand photocopy machine."

To combat this record, and also to avoid the fact that even the dissent below concedes the result reached was the equitable one, Petitioner argues that delivery was conceded and cannot, therefore, be denied. Petitioner persists here, as below, in confusing physical delivery with the legal defense of conditional delivery. Actually, the latter presupposes the former, for unless there were a physical delivery, a delivery upon a condition would be an impossibility. Respondent has never denied that the note is physically in Petitioner's possession, but does contend that the delivery was conditional. None of Petitioner's authorities regarding questions of physical delivery are helpful.

The attack by Petitioner upon the various collateral findings and observations of the trial court are also not determinative of the issue. Even assuming, for point of argument, that every other finding, conclusion and observation of the District Court was erroneous, still the judgment would stand as the issue of conditional delivery alone is fatal to Petitioners' case.

SECOND COUNTERPOINT

A due process question is not before this court.

Some argument is made that the opinion of the Court of Appeals is so erroneous that it, per se, is a denial of the constitutional rights of the Petitioner. (Petition, p. 3, 9, 10). This novel theory is raised for the first time to this Court, but is not raised by a question presented. This tardy attempt to insert a constitutional question in violation of Rule 23 (1) (c) *Supreme Court Rules* should not be considered by this Court both for lack of merit as well as procedural deficiencies.

Ellis v. Dixon, 349 U.S. 458 (1955);

Flournoy v. Wiener, 321 U.S. 253 (1944);

National Licorice Co. v. N.L.R.B., 309 U.S. 350 (1940);

United States Constitution, Fifth Amendment.

THIRD COUNTERPOINT

No justification for issuance of a writ exists.

Notwithstanding the strong language of the Petition, this case is nothing more than a matter of private litigation turning upon the construction of particular pleading and the

evaluation of evidence. No special consideration exists, and Petitioner has shown none, under *Rule 19, Supreme Court Rules*, for this Court to issue its Writ. Petitioner has had his day in Court, and has had his appeal. This lawsuit should be concluded.

PRAYER

WHEREFORE, Respondent prays that Petitioner's application for Writ of Certiorari be denied.

Respectfully submitted,

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